SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
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No. 71-422

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF AMICI CURIAE ON BEHALF OF ASSURANCEFORENINGEN GARD, ASSURANCEFORENINGEN SKULD, THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED, THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION, THE LIVERPOOL AND LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED, THE LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED, NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED, SUNDERLAND STEAMSHIP PROTECTING & INDEMNITY ASSOCIATION, SVERIGES ANGFARTYGS ASSURANS FORENING, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), AND THEIR RESPECTIVE MEMBERS, IN SUPPORT OF APPELLANTS LAKE CARRIERS' ASSOCIATION, AMERICAN STEAMSHIP COMPANY, et al.

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Assuranceforeningen Gard, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association, Limited, The Japan Ship Owners Mutual Protecting and Indemnity Association, The Liverpool and London Steam Ship Protection and Indemnity Association, Limited, The London Steamship Owners' Mutual Insurance Association Limited,

Newcastle Protection and Indemnity Association, The North of England Protecting & Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association, Limited, Sunderland Steamship Protecting & Indemnity Association, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) ("the Associations"), and their respective members, respectfully submit their brief *amici curiae*, in support of Appellants herein, on consent of all parties pursuant to Rule 42.2. The consent of Appellants is evidenced by their letter to counsel for the Associations dated January 17, 1972, and the consent of Appellees by their letter of same date; the originals of these letters have been submitted to the Clerk for filing with this Brief.

QUESTIONS PRESENTED

The questions presented on this appeal are set forth at pp. 5-7 of Appellants' Jurisdictional Statement and need not be repeated here in detail. In the view of the Associations, the underlying question presented for this Court's decision is the fifth of those enumerated by Appellants, *i.e.*, does the Michigan Watercraft Pollution Control Act of 1970 ("the Michigan Act")[1] contravene the essential purposes of, and work material injury to characteristic features of the maritime law and interfere with its proper harmony and uniformity? If this Court answers this question affirmatively, the Michigan Act must be struck

[1] Act 167, PUBLIC ACTS OF 1970, STATE OF MICHIGAN; S.L. '48 § 323.331; M.S.A. § 5353(201) *et seq.* The text of the Act is set out in full as Appendix G to Appellants' Jurisdictional Statement (pp. 56-60).

down as contrary to the Admiralty Clause of the Constitution.[2]

The preliminary question requiring consideration by this Court is whether or not the three-judge court below abused its discretion in declining to consider the constitutionality of the Michigan Act.

INTEREST OF AMICI CURIAE

The Associations filing this brief as *amici* are composed of the owners and operators of approximately three-quarters of the world's ocean-going vessel tonnage, flying the flags of almost every maritime country, including approximately 4 million tons under American flag. The members of each of the Associations mutually insure one another on the indemnity principle, through the medium of their particular Association, against liabilities of numerous types arising out of the ownership and operation of their vessels, including liabilities for pollution damage. A substantial number of vessels owned or operated by members of the Associations call at Michigan ports. The Associations and their respective members are therefore materially affected by the Michigan Act, inasmuch as it purports to require substantial structural modifications in all vessels entering Michigan waters and provides that any person violating any of its provisions is guilty of a misdemeanor and subject to a fine of not more than $500.

More importantly, however, the Associations are concerned with the substantive question whether the individual states may constitutionally enact their own statutory schemes, no matter how well meant, affecting the operation,

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[2] ARTICLE III, SECTION 2: "The judicial Power [of the United States] shall extend * * * to all Cases of admiralty and maritime jurisdiction * * *."

structural alteration, inspection and maintenance of domestic and foreign vessels engaged in commerce on interstate or international waterways, whereas Appellants will presumably concentrate on the effect of the Michigan Act on Great Lakes shipping. The Associations and their members, on the other hand, are not only directly concerned with legislation affecting the Lakes, but seek to direct this Court's attention to the mushrooming of disparate and conflicting state water pollution statutes, all of which, in the Associations' view, contravene the Admiralty Clause.

This appeal presents an important question of constitutional law similar to that presented in *American Waterways Operators, Inc. et al.* v. *Askew et al.*,[3] wherein the 15 Associations were Intervening Plaintiffs. Unlike the court below in the case presently before this Court, a three judge court in *American Waterways* considered a water pollution statute of the State of Florida[4] and held it unconstitutional in its entirety, as in violation of the Admiralty Clause. A Notice of Appeal from this decision, dated December 22, 1971, has been filed by the State of Florida and the officers concerned, pursuant to 28 U.S.C. § 1253 and Rule 10 of this Court; under Rule 13 the appeal must therefore be docketed no later than March 9, 1972.

The Associations will of course be parties to the appeal, which will present squarely the basic constitutional question common to both appeals. The Associations therefore respectfully suggest the consolidation of the two appeals, in accordance with Rule 43.5 of this Court.

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[3] No. 71-156-Civ-J (M. D. Fla., December 10, 1971). A copy of the decision is annexed as Appendix A.

[4] The Florida Oil Spill Prevention and Pollution Control Act, Florida Laws of 1970, Ch. 376, 1970 Supplement to Florida Statutes, 1969 ("the Florida Act").

ARGUMENT

I.

The three-judge court below abused its discretion in declining to consider the constitutionality of the Michigan Watercraft Pollution Control Act.

The terms of the Michigan Act are so plain as to require no interpretation whatever by the Michigan courts. The sections with which the Associations are most vitally concerned are 4(2), 7(2) and 8. Sections 4(2) and 8, if held valid, would empower the State to require structural alterations of domestic and foreign vessels using Michigan waters and to inspect such vessels for compliance. Section 7(2), if upheld, would impose unlimited liability on vessel owners and operators for costs incurred by the State in removing discharges of oil and oily wastes. For the reasons hereinafter stated, the Associations maintain that the Michigan Act is an improper incursion into areas of maritime law wherein, under the Admiralty Clause, only Congress may validly legislate.

The court below found that following passage of the Michigan Act, state officers ". . . began its implementation by, first, enforcing the requirements relating to pleasure craft and then by approaching the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the Act."[5]

The court below further found that "As a result of the overtures of state officials, with the aim of establishing voluntary compliance within a reasonable time, some ship owners have installed holding tanks to control sewage discharge. . . ."[6]

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[5] Appendix A to Appellants' Jurisdictional Statement, p. 24.

[6] Appendix A to Appellants' Jurisdictional Statement, p. 25.

Nevertheless the court below, noting that no criminal prosecutions were pending or threatened "which would realistically infer that plaintiffs [Appellants] in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course,"[7] held that no justiciable controversy existed, and so declined to take up the merits of the case.

In so holding, the court applied the wrong yardstick; it ignored the frequently quoted definition of "controversy" found in *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-1 (1937):

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages." (*Citations omitted.*)

Lack of proof of an immediate threat of enforcement of a challenged statute has repeatedly been held no bar to a consideration of the merits of the case by this Court. *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923); *Euclid*

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[7] Appendix A to Appellants' Jurisdictional Statement, p. 30.

v. *Ambler Co.*, 272 U.S. 365 (1926); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Currin* v. *Wallace*, 306 U.S. 1 (1939).

The court below did not suggest an answer to the puzzling question how the Michigan courts could consider a case which the three-judge court itself held did *not* present a justiciable controversy. In any event, this Court has frequently "... emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate [a] federal claim," *Zwickler* v. *Koota*, 389 U.S. 241, 251 (1967) and cases cited at pp. 250-2; a three-judge court has jurisdiction over all claims made against a state statute, where one of the claims presents a federal constitutional question. *Louis. & Nash. R. R. Co.* v. *Garrett*, 231 U.S. 298 (1913); *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 80-1 (1960).

II.

The Michigan Act violates the admiralty clause of the constitution and should for that reason be declared invalid.

A. Only Congress has the Power to Legislate in the Sphere wherein the Michigan Act Purports to Apply.

Almost 100 years ago this Court, in *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874), explained the purpose and meaning of the Admiralty Clause in the following frequently quoted language:

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the

United States shall extend 'to all cases of admiralty and maritime jurisdiction'.

* * *

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." (pp. 574-575)

* * *

"The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be." (p. 576)

This Court has since held repeatedly that the Admiralty Clause, read in conjunction with the Necessary and Proper Clause,[8] vests in Congress the paramount power to enact legislation in the maritime field. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *Dawson & Co.*, 264 U.S. 219 (1924).

In the landmark *Jensen* case, *supra*, this Court held that a state workmen's compensation statute could not validly be applied to the death of a longshoreman resulting from an accident on board a vessel afloat in the navigable waters

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[8] CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 18: "The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

of the State. In holding that state legislation may not contravene an applicable federal statute or affect the general maritime law, except within narrowly circumscribed limits, the Court cited *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866), which struck down a state statute purporting to authorize proceedings *in rem* according to the practice in admiralty, and *The Roanoke*, 189 U.S. 185 (1903), holding that even before enactment of the Federal Maritime Lien Act,[9] maritime liens for materials furnished to foreign vessels could not validly be created by state statutes. Referring to state statutes in the maritime field, the Court said:

> ". . . [P]lainly, we think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. . . .
>
> A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. 'Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 507, 508; *Vance* v. *Vandercook Co.*, 170 U.S. 438, 444; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311. And the same

[9] June 5, 1920, c. 250, § 30, subsections P-T, 41 Stat. 1006; 46 U.S.C. §§ 971-75 (1964).

character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved." (pp. 216-17).

Noting that the work of a longshoreman in loading a vessel is maritime in nature, and that the rights and liabilities arising from injuries sustained while engaged in such work are matters clearly within the admiralty and maritime jurisdiction of the United States, the Court continued:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. * * *. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid." (pp. 217-18).

The Court then stated that the remedy which the New York Workmen's Compensation Statute purported to give was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and therefore not "saved to suitors" from the otherwise exclusive grant of admiralty jurisdiction to the federal district courts made by Section 9 of the Judiciary Act of 1789.[10]

Evidently acting in the belief that *Jensen* was based primarily on this Court's observation that workmen's com-

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[10] Sept. 24, 1789, c. 20, 1 Stat. 76; *as amended*, 28 U.S.C. § 1333 (1964).

pensation was not a common law remedy saved to suitors under the Judiciary Act, Congress promptly amended that statute so as to save to suitors, not only their common law remedies, but also any "rights and remedies under the Workmen's Compensation Law of any State". This amendment was, however, struck down by this Court in *Knickerbocker, supra,* where, after referring to its earlier decisions, including *Jensen,* the Court stated:

> "... The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
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> * * *
>
> The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress ". (253 U.S., at pp. 160-61)

The following are additional examples of the host of decisions of this Court holding that the States are just as powerless to contravene the general maritime law, as accepted by the federal courts, as they are to enact legislation in contravention of acts of Congress:

Chelentis v. *Luckenbach S.S. Co.,* 247 U.S. 372 (1918), holding that prior to passage of the Jones Act,[11] the

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[11] Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185, *as amended* June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U.S.C. § 688 (1964).

general maritime law, and not state law, must be applied in actions for seamen's injuries, even if brought in state courts;

Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942), where this Court refused to apply Pennsylvania law, whereunder the burden of proving the invalidity of a release is on the releasor, in a Pennsylvania state court action for a seaman's injuries, and instead applied the general maritime law, whereunder one asserting a seamen's release as a defense has the burden of proving its validity;

Kossick v. *United Fruit Co.*, 365 U.S. 731 (1961), holding a state Statute of Frauds inapplicable to an oral guaranty allegedly given to a seaman by his employer;

Kermarec v. *Compagnie Generale*, 358 U.S. 625 (1959), applying the general maritime law, rather than the law of New York, to an injury sustained by a visitor on board a vessel in New York harbor;

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406 (1953), holding that the general maritime law, whereunder contributory negligence does not bar a recovery, but is only considered in mitigation of damages, must be applied in suits for maritime injuries, regardless of the forum;

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), overruling *The Harrisburg*, 119 U.S. 199 (1886), and holding that the general maritime law affords a cause of action for wrongful death and that that law, rather than state law, must be applied in assessing liability for a death resulting from circumstances occurring within the admiralty jurisdiction.

It was against the background of these and similar decisions that a three-judge court in *American Waterways*,[12] (from which an appeal to this Court has been

[12] Note 3, p. 4, *supra;* Appendix A hereto.

noticed) held the Florida Oil Spill Prevention and Pollution Control Act[13] invalid as in contravention of the Admiralty Clause.

The State may argue that the Michigan Statute should be upheld under *Huron Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) which involved a city ordinance whereunder shipowners were subject to a $100 fine and ships' officers to jail sentences of not exceeding 30 days for the emission of smoke from their vessels.

This Court found that ". . . the sole aim of the Detroit ordinance [was] the elimination of air pollution to protect the health and enhance the cleanliness of the local community", whereas the purpose of the federal statutes and regulations relating to boilers and propulsion and auxiliary machinery of sea-going vessels was ". . . to insure the sea-going safety of vessels subject to inspection". 362 U.S., at p. 445. The Court therefore concluded, Justices Douglas and Frankfurter dissenting, that the federal inspection laws and the ordinance did not "overlap", and that the federal laws therefore did not pre-empt the field. 362 U.S., at p. 446. The Court noted, however:

> "The scope of the privilege granted by the federal licensing scheme has been well delineated. A state may not exclude from its waters a ship operating under a federal license. *Gibbons* vs. *Ogden*, 9 Wheat. 1. A state may not require a local occupation license, in addition to that federally granted, as a condition precedent to the use of its waters. *Moran* vs. *New Orleans*, 112 U.S. 69. While an enrolled and licensed vessel may be required to share the costs of benefits it enjoys, *Huse* vs. *Glover*, 119 U.S. 543, and to pay fair taxes imposed by its domicile, *Transportation Co.* vs. *Wheeling*, 99 U.S. 273, it cannot be subjected to local license imposts exacted for the use of a navigable waterway, *Harman* vs. *Chicago*, 147 U.S. 396. See also *Sinnot* vs. *Davenport*, 22 How. 227".

[13] Note 4, p. 4, *supra*.

The Associations respectfully submit that *Huron,* which makes no mention of the Admiralty Clause, cannot be fully reconciled with the long line of decisions commencing with *The Lottawanna,* illustrations whereof are cited at pp. 8-12 *supra.* In any event the instant case plainly presents the "overlap" not found in *Huron,* for here federal laws and regulations were promulgated for the same purpose as the Michigan Act.

B. Congress has Exercised its Power by Legislating Extensively in the Sphere wherein the Michigan Act Purports to Apply; to that Extent the Act would be Unconstitutional, Even if it were Otherwise Valid.

1. *Federal Water Pollution Legislation.* Congress has been providing by statute for the prevention and minimization of water pollution, including pollution by vessels, since 1886. The federal statutes in the area, which supplement and to some extent alter the general maritime law applicable to water pollution, include The New York Harbor Act of 1886;[14] Rivers and Harbors Act of 1899;[15] Refuse Act of 1899;[16] Oil Pollution Act of 1924;[17] Water Pollution Control Compact Act;[18] Federal Water Pollution Control Act, as amended;[19] An Act to Implement the Provisions of the International Convention for the Prevention of the Pollution of the Sea by Oil;[20] The Clean Waters Restora-

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[14] *As amended,* 33 U.S.C. §§ 441-451b (1964).

[15] 33 U.S.C. §§ 403, 406 (1964).

[16] 33 U.S.C. § 407 (1964).

[17] 33 U.S.C. §§ 431-37 (1964); *repealed,* April 3, 1970, Pub. L. 91-224, Title I, § 108, 84 Stat. 113.

[18] July 31, 1947, c. 407, 61 Stat. 682-5.

[19] 33 U.S.C. §§ 1151-60 (1964).

[20] 33 U.S.C. §§ 1001-15 (1964).

tion Act of 1966,[21] and the Water Quality Improvement Act of 1970 ("W.Q.I.A.").[22]

The latest and most comprehensive of these statutes is W.Q.I.A., which provides, among other things, elaborate schemes for the control of vessel sewage [23] and oil pollution,[24] as well as for promulgation of regulations by the President concerning abatement of pollution by other hazardous substances.[25]

Despite the detailed and comprehensive regulatory scheme for the control of water pollution embraced in W.Q.I.A. and its antecedents, the State of Michigan, by enacting its own legislation, has sought to duplicate, contravene and contradict the provisions of the federal statutes, causing an intolerable burden upon international, interstate and intrastate maritime commerce.

Section 11(o)(2) of the Federal Water Pollution Control Act, as amended by W.Q.I.A.,[26] provides that "Nothing in this section shall be construed as pre-empting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." However, it is elementary that Congress cannot give to the States powers which they have surrendered to the Federal Government under the Constitution. *Knickerbocker Ice Co.* v. *Stewart*, 253

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[21] *As amended*, 33 U.S.C. §§ 1153, 1155-60 (1964).

[22] 33 U.S.C. §§ 1161-75 (1964). As of this writing, an extensive revision of W.Q.I.A. is under consideration by Congress. See, for example, Federal Water Pollution Control Act Amendments of 1971, S. 2770, 92d Cong. 1st Sess., passed by the Senate on Nov. 2, 1971.

[23] 33 U.S.C. § 1163 (1964).

[24] 33 U.S.C. § 1161 (1964).

[25] 33 U.S.C. § 1162 (1964).

[26] 33 U.S.C. § 1161(o)2 (1964).

U.S. 149, 160 (1920), *supra*, p. 11. Among the most important of these are the paramount power of Congress to legislate in the maritime field and the power of the federal judiciary to define the general maritime law which must prevail throughout all of the United States.

2. *Federal Legislation and International Agreements Concerning Inspection of Vessels.* Section 8 of the Michigan Act would, if valid, subject domestic and foreign vessels using Michigan waters to inspection by the Michigan Water Resources Commission, its agents, and inspectors, or any peace, conservation or police officer, for the purpose of determining whether it is equipped as § 4(2) of the Act requires.

Federal legislation,[27] together with the regulations issued pursuant thereto, set up a detailed and comprehensive scheme, administered by the United States Coast Guard, for inspection and regulation of all vessels (except motor boats, which are otherwise provided for) propelled by steam or any other form of mechanical or electrical power. This legislation covers foreign as well as domestic vessels "navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation." All navigable waters of the State of Michigan, with the exception of land-locked lakes, are part of the navigable waters of the United States, and are thus included. *Ex Parte Boyer*, 109 U.S. 629 (1884). The federal scheme includes requirements for construction of vessels, their equipment and maintenance, and is in consonance with the 1960 International Convention on the Safety of Life at Sea [28] which has been ratified or adhered to by all maritime nations, including the United States, and which contains detailed requirements for the construction, maintenance and inspection of all seagoing vessels.

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[27] 46 U.S.C. §§ 361-436 (1964).

[28] TIAS 5780, 16 UST 185, 536 UNTS 27.

It is not only unconstitutional but totally impractical for the State of Michigan—or any other state—to attempt to set up its own inspection requirements for vessels trading to the state, in addition to the detailed scheme devised by the United States Government in cooperation with other maritime nations. The Michigan legislature apparently recognized the need for uniformity by enacting Section 9 of the Act, which reserves to the State the "exclusive right" to establish requirements in this area "in order to insure statewide uniformity." But Michigan, any more than any of its political subdivisions, is not an island unto itself. It is manifestly improper for Michigan, or any other state, or any political subdivision thereof, to enact its own—and conflicting—legislation in this field.

3. *The United States Limitation of Liability Act.* The United States Limited Liability Act (more commonly known as the "Limitation Statute"), Title 46 U.S.C. §§ 183-89, provides a scheme for limitation of the liability of a vessel owner or demise charterer for damage not caused with his "privity or knowledge."

By enacting W.Q.I.A., Congress effectively amended the Limitation Statute in respect of one class of claims, i.e., claims of the United States Government for the cost of cleaning up an oil spill which the shipowner is unable to prove was the result of a cause excepted under W.Q.I.A. (act of God, act of war, negligence of the United States Government, or act or omission of a third party). Under W.Q.I.A., United States Government claims for clean-up costs are not subject to the Limitation Statute governing other property claims. Instead, W.Q.I.A. sets up a separate "limitation fund" of $100 per gross ton (with a ceiling of $14,000,000) for the purpose of reimbursing the United States Government for clean-up costs. Title 33 U.S.C. § 1161(f)(1).

W.Q.I.A. thus substantially altered the pre-existing law of limitation of liability. What Congress itself could do,

however, the states are powerless to do; no state statute is valid if it contravenes the United States Limitation Statute. *Butler* v. *Boston Steamship Co.*, 130 U.S. 527 (1889); *Paladini* v. *Flink*, 26 F.2d 21 (9th Cir. 1928); *Loughin* v. *McCaulley*, 186 Pa. St. 517, 40 Atl. 1020 (S.Ct. Pa. 1898).

In *Loughin* v. *McCaulley, supra*, the Supreme Court of Pennsylvania held that the United States Limitation Statute was paramount over a provision of the Pennsylvania State Constitution purporting to prohibit limitations on the amount of recoveries for injuries resulting in death. The Court struck down the contention that the Limitation Statute could not prevail against the Pennsylvania constitutional provision, saying that it was "clear that neither statute nor constitution of Pennsylvania can be set up against a right given by congress in its control of the maritime law of the country. That control is paramount, and, when it has been exercised in a particular way, all state authority must conform to it."

It is plain from the decisions cited that Section 7(2) of the Michigan Act, insofar as it may purport to impose not only absolute liability, but liability without limitation as to amount, for the costs of removal of oil or oily wastes which have been discharged from vessels, is in contravention of the United States Limitation Statute, and would therefore be invalid and unenforceable, even if it were otherwise valid.

4. *The Boundary Waters Treaty between the United States and Canada.* Commercial vessels which ply the Great Lakes and the St. Lawrence Seaway fly the flags of all the maritime nations of the world, and the waters themselves form part of the territories of seven states of the United States and two provinces of Canada. There is no practical way that any single governmental entity, acting unilaterally without reference to the international aspects of the problem, can solve the ecological crisis, and any

attempts to do so made by individual states, even if constitutional (which they are not), would not only fail to solve it but would inevitably bring about a serious impairment of the essential water-borne commerce of the area concerned. It was undoubtedly in recognition of the fact that navigation of the Great Lakes cannot be controlled by one nation alone that in 1909 the United States and Great Britain entered into the Boundary Waters Treaty between the United States and Canada,[29] pursuant to which an International Joint Commission was set up and given jurisdiction in cases involving the use of the Great Lakes and related waters.

As the Boundary Waters Treaty is the supreme law of the land, and as the Michigan Act contravenes the Treaty, it would for that reason be invalid, even if the Admiralty Clause of the Constitution were non-existent. *United States* v. *Pink*, 315 U.S. 203, 230-31 (1942).

Conclusion

The Michigan Act contravenes a number of other provisions of the United States Constitution, including the Commerce Clause. However, its provisions pertaining to vessels are so manifestly in violation of the Admiralty Clause that an analysis of the other constitutional objections by these Amici Curiae is not considered necessary.

Michigan is but one of some 30 states which border upon, or have navigable outlets to the sea. A number of these have already enacted pollution legislation vitally affecting vessels. If the Michigan Act were permitted to stand, those States that have thus far refrained from enacting legislation of this sort would be almost certain to follow Michigan's example.

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[29] 36 Stat. 2448, TS 548; III *Redmond* 2616.

Michigan, Florida, Maine, Massachusetts, Rhode Island, Washington and other state pollution laws already enacted are by no means uniform. If vessel operators eventually had to contend with 30 state laws, as well as federal law, in this country alone, the results would be completely chaotic. Still more American shipowners would surely be added to the growing list of those who have been obliged to discontinue operations in recent years, and many foreign owners would reluctantly find it necessary to stop trading their ships to United States ports. The American public would be bound to suffer, as the end result would be shortages of oil and other products which depend on water transportation, and higher prices for such as might still be carried.

No responsible individual or company wants to see the marine environment spoiled. Every reasonable effort should be made to eliminate marine pollution or, at least, to keep it at an absolute minimum consistent with the public's demands for oil and the other water-borne products which have come to be considered necessities of modern life. Improvements in the design of ships and in the training of the officers and crews who man them, and improvements in the methods employed by governmental authorities, by the oil companies, and by vessel operators in coping with discharges of polluting substances will be of immense help, but it must be borne in mind that setting such standards with respect to United States flag vessels is a matter for national, and not for state or local regulation.

Insofar as foreign-going ships are concerned, it is plain that the setting of standards should be international in scope, and great progress has already been achieved in the movement to bring this about. Meanwhile, such regulation should be left to the Federal Government. To permit the states to enter the field would set the movement for international uniformity back many years, without any improvement whatever in the marine environment.

PRAYER

The Associations, as *Amici Curiae*, respectfully pray that this Court may, in the exercise of its discretion, set this appeal down for argument together with the appeal which has been noticed in *American Waterways Operators, Inc., et al.* v. *Askew, et al.*, and that after the hearing thereof it may reverse the decision of the United States District Court for the Eastern District of Michigan and remand the case, with instructions to enter a decision in favor of Appellants.

Dated: January 20, 1972.

Respectfully submitted,

NICHOLAS J. HEALY,
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of Counsel

CERTIFICATE OF SERVICE

We, Nicholas J. Healy and Gordon W. Paulsen, members of the bar of this Court, hereby certify that on the 21st day of January, 1972, we served copies of the foregoing Motion and Brief *Amici Curiae* on the several parties hereto, as follows:

On Appellants Lake Carriers' Association and American Steamship Company *et al.*, by mailing three copies thereof to their Attorney, Scott H. Elder, Esq., addressed to him at 2700 Terminal Tower, Cleveland, Ohio 44113.

On Appellees Ralph A. MacMullan, Individually and as Director, Michigan Department of Natural Resources, *et al.*, by mailing three copies thereof to their attorneys, Hon. Frank J. Kelley, Attorney General of the State of Michigan, Stewart H. Freeman, Esq., Assistant Solicitor General, and Jerome Maslowski, Esq. and Francis J. Carrier, Esq., Assistant Attorneys General addressed to them at 630 Seven Story Building, 525 West Ottawa Street, Lansing, Michigan 48913.

Dated: New York, N. Y.
January 21, 1972

NICHOLAS J. HEALY

GORDON W. PAULSEN
Attorneys for Movants,
Assuranceforeningen Gard, *et al.*

APPENDIX A

[Memorandum Opinion and Final Judgment in American Waterways Operators, *et al.* v. Askew, *et al.*, 71-156-CIV-J (M.D. Fla., Dec. 10, 1971)]

Appendix A

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

THE AMERICAN WATERWAYS OPERATORS, INC., a Delaware corporation; GULF ATLANTIC TOWING CORPORATION, a Florida corporation; GLIDDEN-DURKEE, a division of SCM, CORPORATION, a New York corporation; DIXIE CARRIERS, INC., a Delaware corporation; OIL TRANSPORT COMPANY, INCORPORATED, a Louisiana corporation; NATIONAL MARINE SERVICE, INC., a Delaware corporation; THE REVILO CORPORATION, a Florida corporation; EASTERN SEABOARD PETROLEUM COMPANY, INC., a Florida corporation; NILO BARGE LINE, INC., a Delaware corporation; STEUART TRANSPORTATION COMPANY, a Delaware corporation; INTERSTATE OIL TRANSPORT COMPANY, a Delaware corporation; FEDERAL BARGE LINES, INC., a Delaware corporation; GULF CANAL LINES, INC., a Texas corporation; and INGRAM OCEAN SYSTEM, INC., a Delaware corporation, all authorized to do business in the State of Florida,

Plaintiffs,

and

SUWANNEE STEAMSHIP CO., a Florida corporation; COMMODORES POINT TERMINAL CORPORATION, a Delaware corporation; AMERICAN INSTITUTE OF MERCHANT SHIPPING; ASSURANCE FORENINGEN GARD; ASSURANCE FORENINGEN SKULD; THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED; THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION; THE LIVERPOOL AND LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED; THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED; NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION; THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION, LIMITED; THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION; THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA), LIMITED; THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED; SUNDERLAND STEAMSHIP PROTECTING AND INDEMNITY ASSOCIATION; SVERIGES ANGFARTYGS ASSURANSFORENING; THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA), LIMITED; THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG); and their respective members,

Intervening Plaintiffs,

against

REUBIN O'D. ASKEW, as Governor of the State of Florida; RICHARD B. STONE, as Secretary of State of the State of Florida; ROBERT L. SHEVIN, as Attorney General of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; DOYLE E. CONNER, as Commissioner of Agriculture of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; THOMAS D. O'MALLEY, JR., as Treasurer of the State of Florida; as and constituting THE DEPARTMENT OF NATURAL RESOURCES, State of Florida; RANDOLPH HODGES, as Executive Director, and TOM SIMPSON, as Conservation Officer of Duval County, DEPARTMENT OF NATURAL RESOURCES, State of Florida; and THE STATE OF FLORIDA,

Defendants.

Appendix A

MEMORANDUM OPINION AND FINAL JUDGMENT

Before, RONEY, *Circuit Judge,* and SCOTT and TJOFLAT, *District Judges.*

TJOFLAT, *District Judge*:

During the 1970 session the Florida Legislature passed the "Oil Spill Prevention and Pollution Control Act" [1] (hereinafter called the "Florida Act") in an attempt to prevent pollution by the shipping industry of waters within the territorial jurisdiction of the State of Florida. The Act imposes unlimited liability without fault upon virtually any vessel which discharges oil or any other pollutant while destined for or leaving any Florida port.[2] Onshore and offshore terminal facilities are subject to the same liability.[3] The Act requires every owner or operator of a vessel using a Florida port or a terminal facility to pay whatever cleanup costs or damages may result from the discharge of pollutants [4] and to maintain satisfactory evidence of financial responsibility to satisfy such liability.[5] The Department of Natural Resources is empowered to require any vessel transporting a pollutant in state waters to be equipped with specified containment gear and a crew trained in its use.[6] Prior to entering a Florida port, every vessel is subject to inspection by the port manager to determine the presence of the required container gear and the seaworthiness of the ship.[7] He is required to notify all other ports in the state of any vessel refused entry to his port.[8]

Plaintiffs and intervenors include merchant shippers whose vessels use Florida ports in the course of transporting goods in foreign and interstate commerce; world shipping associations who insure three-fourths of the ocean-going tonnage against, among other things, liability for

oil spillage; a substantial portion of the barge and towing industry operating along the Florida coast; and owners of oil terminal facilities located in Florida ports. They have challenged the validity of the Florida Act on several federal constitutional grounds. Plaintiffs' initial contention is that Florida has sought to legislate substantive maritime law which, under the United States Constitution, is exclusively within the federal domain. Secondly, they contend that the Act violates the Commerce Clause, since it seeks to regulate foreign and interstate commerce. Certain provisions of the Act are under piecemeal attack on Fourteenth Amendment due process and equal protection grounds. The resolution of the first of these contentions dictates the decision in this case, and the others will not be discussed.

The maritime law of the United States has evolved under Article 3, Section 2, of the Constitution which extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." In a territorial sense that jurisdiction covers all waters navigable in interstate or foreign commerce, including state waters.[9] Maritime law governs virtually every facet of the shipping industry from the design and construction of vessels to the regulation of their day to day operations and the transactions in which they engage. It comprises traditional admiralty rules and concepts found initially in the European authorities. These rules and concepts have been augmented from time to time by the federal judiciary to accommodate needs distinctive to this nation. Further changes in the corpus of maritime law have been effected by a variety of congressional enactments and administrative regulations.[10] One of these congressional enactments is the Water Quality Improvement Act of 1970[11] (hereinafter called "W.Q.I.A.") which became law a few months prior to the effective date of the Florida Act. W.Q.I.A. provides plaintiffs with tangible evidence that the

Florida Act is an unconstitutional intrusion into the federal maritime domain.

The W.Q.I.A. reinforces the national anti-water pollution policy. In this act Congress declared that there should be no discharge of oil into or upon the navigable waters and shorelines of the United States.[12] The owner or operator of a vessel or an onshore or offshore facility is subject to limited liability without fault for the costs expended by the government in cleaning up an oil spill.[13] Where the spillage results from willful negligence or misconduct, however, liability for such costs can be unlimited.[14] Evidence of financial responsibility sufficient to cover its potential liability must be given by any vessel of 300 gross tons or more that uses the navigable waters of the United States.[15] Additionally, the President is authorized to issue regulations requiring, among other things, that vessels maintain oil spill prevention equipment and be subject to boarding for inspection purposes at any time.[16]

In adopting W.Q.I.A. Congress anticipated that all hazardous substances, in addition to oil, capable of polluting navigable waters would be subject to similar legislative treatment.[17] W.Q.I.A. required the President to promulgate regulations defining such hazardous substances and establishing methods and means for their removal.[18] He was also required to report to Congress, by November 1, 1970, on the desirability of enacting legislation to establish liability for the cost of removing hazardous substances discharged from vessels and onshore and offshore facilities.[19]

That the Florida Act constitutes unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. The most obvious changes would be in the liability now imposed by W.Q.I.A. and maritime rules on shippers and the operators of onshore and offshore facilities.

Appendix A

While both W.Q.I.A. and the Florida Act subject vessels and onshore and offshore facilities to strict liability for cleanup costs, the latter imposes a far greater measure of responsibility. For example, W.Q.I.A. would excuse a shipper who demonstrates that the oil spill was caused by act of God, an act of war, or the act or omission of a third party.[20] The Florida Act recognizes none of these defenses to a claim by the state for cleanup costs. The state is entitled to judgment simply by pleading and proving "the fact of the prohibited discharge." [21] Moreover, the amount of the recovery would be unlimited; whereas W.Q.I.A. would place a limit on exposure, as we have previously noted.[22]

There is perhaps an even greater contrast between maritime law and the Florida Act in compensating state or private interests for property damage, as distinguished from cleanup costs. W.Q.I.A. creates responsibility for cleanup costs only and leaves undisturbed the remedies available under maritime law for private injury caused by oil spillage or other pollution. The federal courts have long considered oil pollution as a maritime tort for which damages may be awarded.[23] Compensation is recoverable for injury to property and allowances have even been made for consequential damages. In *In re New Jersey Barging Corp.*,[24] an oil spill case, the court approved the following language from the Commissioner's report:

> In the light of the . . . authorities, it would seem to the Commissioner that he is authorized, and in fact required, to make award of compensation for such annoyance, inconvenience and discomfort suffered by particular claimants to the extent of and in an amount commensurate with the annoyance and discomfort proven.

The recovery of damages in such cases is predicated on proof of negligence or unseaworthiness. The owner of a

seaworthy vessel would not be liable, for example, if he encountered an extraordinary peril which resulted in a non-deliberate and non-negligent pollution of the shoreline. Even if fault were established, the vessel owner's financial responsibility for property damage would be limited to the value of the vessel at the end of the voyage, plus the "freight then pending," unless the damage was caused with the owner's "privity or knowledge." [25]

Under the Florida Act, however, liability without fault is the foundation for "damage incurred by the state and for damage resulting from injury to others", just as it is in the case of cleanup costs. By substituting absolute liability for proof of negligence or unseaworthiness as a condition to unlimited recovery, the Florida Act, if valid, would materially change the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters.

It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in the maritime field. In the landmark *Jensen* case,[26] the Supreme Court, in holding that the New York State Workmen's Compensation Statute could not constitutionally be applied where an accidental death occurred on a vessel afloat in navigable waters within New York's boundaries, said:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamen-

tal purposes for which such law was incorporated into our national laws by the Constitution itself.[27]

* * *

> If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. . . . The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.[28]

The Florida Act here constitutes a far greater intrusion into the federal maritime domain than the New York statute in the *Jensen* case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of *Jensen*—the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded".

This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on federal interests. Rather, this is a case where the State purports to impose upon shipping and related industries duties which under the federal law they do not bear. It can hardly be said that Florida is not seeking to regulate conduct in the federal maritime jurisdiction. We need not belabor the point that to permit the states severally to regulate these

industries as Florida seeks to do would sound the death knell to the principle of uniformity.

Defendants argue that, to the extent the Florida Act goes beyond W.Q.I.A., it fills a "void" in the maritime law and is justifiable under the "gap theory".[29] This theory presupposes that maritime law is an incomplete system, with numerous gaps that can be filled by state statutes. This is to say, if the maritime law affords no remedy, the states may provide one. The Supreme Court's recent decision in *Moragne* v. *States Marine Lines, Inc.*[30] clearly puts such a theory to rest.

In that case the Court had before it the question of the applicability of the Florida Wrongful Death Statute[31] to a claim arising out of the death of a longshoreman killed while working aboard a vessel in navigable waters within the State of Florida. Neither the general maritime law nor Congressional enactment provided a remedy in the situation. The District Court and the Court of Appeals, citing *The Tungus* v. *Skovgaard,*[32] held that the state statute should be invoked to provide the remedy as well as the basis for recovery, that is, negligence.

Under maritime law, however, States Marine Lines owed plaintiff's decedent the duty to provide a seaworthy vessel in addition to the duty to exercise due care. Plaintiff therefore argued that an action was maintainable for a breach of either duty.

The Supreme Court rejected the notion that the absence of a federal statute or a maritime rule on the subject compelled the conclusion that state law must govern. It held that admiralty was fully capable of fashioning a remedy for the breach of substantive duties imposed by general maritime law and thus directed the district court to shape the remedy on remand. At the same time the Court observed that the Florida law of negligence has no place in the maritime field. The decision clearly re-

inforced the policy of uniformity and is an indication that admiralty cannot tolerate the inconsistency inherent in accommodating state remedial statutes to exclusively maritime substantive concepts.

Another argument advanced by defendants is that the Florida Act is valid under the following provision of W.Q.I.A.:

> Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State. 33 U.S.C. § 1161(o)(2).

It has long been recognized that Congress is powerless to confer on the states authority to legislate within the admiralty jurisdiction [*Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149 (1920);[33] *The Lottawanna*, 21 Wall. 558 (1875); *The Steamer St. Lawrence*, 1 Bl. 522 (1862)] and we cannot presume that W.Q.I.A. was an attempt to do so. There is nothing in the language of the act which purports to grant any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative.

For the foregoing reasons we conclude that the Florida Act in question cannot constitutionally be applied to the plaintiffs and intervenors and to the activities in which they engage. The question thus arises as to whether the Act is severable. Although it contains a severability clause,[34] such a provision is by no means binding on a court empowered to determine the constitutionality of a statute. The rule was explained by the Supreme Court in *Carter* v. *Carter Coal Co.*:[35]

> Whether the provisions of a statute are so interwoven that one being held invalid the others must

> fall, presents a question of a statutory construction and of legislative intent, to the determination of which the statutory provision becomes annexed. "But it is an aid merely; not an inexorable command." *Dorchy* v. *Kansas*, 264 U.S. 286, 290. The presumption in favor separability does not authorize the court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U.S. 330, 362.
>
> The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another.

When a federal court is called upon to rule on the constitutionality of a state statute containing a severability clause, the court will look to the decisions of the state court on the effect of such a clause.[36] In *Cramp* v. *Board of Public Instruction*[37] the Supreme Court of Florida made the following pronouncement on the question of severability:

> The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.[38]

In the Florida Act there are no provisions which, though standing by themselves might be considered unob-

jectionable, are not so interwoven in purpose and scheme with the invalid provisions of the Act as to permit the operation of the severability clause. The announced intent of the Florida Legislature was to "deal with the hazards and threats of danger and damage posed by . . . transfer of pollutants between vessels, between onshore facilities and vessels, and between offshore facilities and vessels within the jurisdiction of the state and state waters. . . ." [39] Each provision of this statute was enacted to realize this intent and each would affect the industries in which plaintiffs and intervenors engage. The provisions that do not directly frustrate the federal maritime law are so few that, considered together, they would not comprise a coherent legislative scheme. Accordingly, the Act in its entirety must fall.

In consideration of the foregoing, it is

ORDERED:

1. Chapter 70-244, Laws of Florida, as amended in Chapter 376, Florida Statutes Annotated, is hereby declared to be in violation of Article III, Section 2, Clause 3 of the Constitution of the United States and is therefore null and void and without effect.

2. The temporary restraining order entered by Judge Charles R. Scott on March 19, 1971, enjoining the enforcement of said chapter and any regulations promulgated thereunder is hereby made permanent; provided that nothing in this final judgment shall be construed to prohibit the defendants from continuing to pay salaries of current employees out of the Coastal Protection Trust Fund.

3. This memorandum opinion and final judgment shall constitute the final judgment of this Court as to all issues presented in this action.

DONE and ORDERED at Jacksonville, Florida, this 10th day of December, 1971.

GERALD B. TJOFLAT
United States District Judge
For the Court

Appendix A

FOOTNOTES

[1] Chapter 376, Florida Statutes Annotated; Chapter 70-244, Laws of Florida (all further citations to the act will be to Florida Statutes Annotated).

[2] Section 376.12, Florida Statutes Annotated, provides in part:

> Liabilities of licensees.—Because it is the intent of this chapter to provide the means for rapid and effective cleanup and to minimize damages, any licensee and its agents or servants, including vessels destined for or leaving a licensee's terminal facility, who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others. In any suit to enforce claims of the state under this chapter, it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel. If the state is damaged by a discharge prohibited by this chapter it need only plead and prove the fact of the prohibited discharge or other polluting condition and that it occurred.

"'Pollutants' shall include, but not be limited to, oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and other hazardous materials." Fla. Stat. Ann. § 376.031(7)

[3] Terminal facilities and vessels are defined as:

> "Terminal facility" means any water front facility of any kind, other than vessels not owned or operated by such facility, and related appurtenances located on land, including submerged lands, or on or under the surface of any kind of water, which facility and related appurtenances are used or capable of being used for the purpose of drilling for, pumping, storing, handling, transferring, processing, or refining oil or other pollutants, including, but not limited to, any such facility and related appurtenances owned or operated by a public utility or a governmental or quasi-governmental body. A vessel shall be considered a terminal facility only in the event of a ship-to-ship transfer of oil, petroleum products or their by-products, and other pollutants, and only that vessel going to or coming

from the place of transfer and the terminal facility. With respect solely to application fees for licenses and annual license fees as required in this act, the words "terminal facility" shall not be construed to include the fuel storage tanks or other facilities of any marine service station having no more than twelve hundred (1200) gallons of pollutants in storage on the premises. Fla. Stat. Ann. § 376.031(9) as amended, Laws of Florida, 71-243.

"Vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise, and includes barges and tugs. Fla. Sta. Ann. § 376.031(12).

[4] See note 2, *supra*.

[5] Section 376.14, Florida Statutes Annotated, provides, in part:

(1) Each owner or operator of a terminal facility or vessel, including any barge, using any port in Florida shall establish and maintain under rules and regulations prescribed by the department of natural resources, evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried, and other similar factors to which the vessel could be subjected under this chapter. Financial responsibility may be established and maintained by any one (1), or a combination, of the following methods acceptable to the department:

(a) Evidence of insurance;

(b) Surety bonds payable to the governor of the state, conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any person;

(c) Qualification as a self-insurer; or

(d) Other evidence of financial responsibility satisfactory to the department.

(2) A bond filed with the department shall be issued by a bonding company authorized to do business in the state.

(3) Any claim for costs incurred by a terminal facility or vessel may be brought directly against the insurer or any other

person providing evidence of financial responsibility. Any claim for costs of cleanup, civil penalties, or damages by the state, and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

[6] Section 376.07, Florida Statutes Annotated, provides in part:

Regulatory powers of department. —The department shall from time to time adopt, amend, repeal, and enforce reasonable regulations insofar as they relate to oil spills or discharges or the spills or discharges of other pollutants into the waters of this state or onto the coasts of this state.

(1) The regulations shall be adopted in accordance with the administrative procedure act, chapter 120.

(2) The department shall adopt regulations including, but not limited to, the following matters:

(a) Operation and inspection requirements for facilities, vessels, personnel, and other matters relating to licensee operations under this chapter, and specifically requiring that vessels transporting pollutants within state waters shall maintain on board such containment gear as may be required by the department with a crew trained in the use of the gear.

(b) Procedures and methods of reporting discharges and other occurrences prohibited by this chapter.

(c) Procedures, methods, means, and equipment to be used by persons subject to regulation by this chapter in the removal of pollutants.

* * *

(f) Requirements for minimum weather and sea conditions for permitting a vessel to enter port and for the safety and operation of vessels, barges, tugs, motor vehicles, motorized equipment, and other equipment relating to the use and operation of terminals, facilities, and refineries, the appproach and departure from terminals, facilities, and refineries and requirements that containment gear approved by the department be on hand and maintained by terminal facilities and refineries with adequate personnel trained in its use.

(g) Requirements that, prior to being granted entry into any port in this state, the master of a vessel shall report:

Appendix A

(1) Any discharges of oil or other pollutants the vessel has had since leaving the last port;

(2) Any mechanical problem on the vessel which creates the possibility of a spill; and

(3) Any denial of entry into any port during the current cruise of the vessel.

[7] Section 376.08(2), Florida Statutes Annotated, provided:

The port manager shall have the authority to board any vessel prior to its entry into port in order to ascertain the seaworthiness of the vessel and the presence of required containment gear. Upon being notified of a discharge the port manager shall have authority to direct the vessel to anchor immediately or move to a specific dock and deploy containment gear or to move to the open seas and to take such other measures as he deems necessary. The port manager shall have the additional duty to inspect any terminal facility in his port to determine that adequate containment gear is on hand at the terminal facility.

[8] Section 376.08(3), Florida Statutes Annotated, provides:

A port manager who refuses entry of any vessel into the port under his charge shall be required to notify all other ports in the state of his refusal of entry of that vessel.

[9] "[T]he admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state." *Gilmore and Black, The Law of Admiralty*, § 1-11, at 28-29 (1957) and cases cited therein.

Arguably, this would include land-locked lakes which are "navigable-in-fact" in interstate commerce.

[10] The "Necessary and Proper Clause" of the United States Constitution (Article I, Section 8, Clause 18), read in context with the "Admiralty Clause" (Article III, Section 2, Clause 3) confers upon

Congress the power to enact legislation in the maritime field. *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149 (1920); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

[11] 33 U.S.C. § 1161 *et seq.*

[12] 33 U.S.C. § 1161(b)(1).

[13] The amount of liability of a vessel is limited to $100 per gross ton or $14,000,000, whichever is less. The liability of an onshore or offshore facility is limited to $8,000,000. 33 U.S.C. § 1161(f)(1), (2) and (3).

At the same time the Steamboat Inspection Act, together with the regulations issued pursuant thereto, sets up a detailed and comprehensive scheme, administered by the United States Coast Guard for maintenance, inspection, and regulation of all vessels (except motor boats, which are otherwise provided for) propelled in whole or in part by mechanical or electrical power in the navigable waters of the United States. 46 U.S.C. §§ 361-62. The Federal scheme is in consonance with the International Convention for the Safety of Life at Sea, 1960, T.I.A.S., 16 U.S.T. 185, 536 U.N.T.S. 27, which has been ratified or adhered to by all maritime nations, including the United States. Here again, conflict between the regualtions under the Florida Act and the federal law appears unavoidable.

[23] *See, e.g., Fireman's Fund Ins. Co.* v. *Standard Oil Co.*, 339 F.2d 148 (9th Cir. 1964); *Salaky* v. *Atlas Barge No. 3*, 208 F.2d 174 (2nd Cir. 1953); *California* v. *The Bournemouth*, 307 F.Supp. 922 (C.D. Cal. 1969); *Petition of New Jersey Barging Corp.*, 168 F.Supp. 925 (S.D.N.Y. 1958). Since the Congressional enactment of the Admiralty Extension Act in 1948 (46 U.S.C. § 740) "all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land*" (emphasis added) are considered maritime torts and thus within the admiralty jurisdiction. *Petition of New Jersey Barging Corp., supra.*

[24] 168 F.Supp. 925, 937 (S.D.N.Y. 1958).

[25] United States Limited Liability Act, 46 U.S.C. § 183 *et seq.* No state statute can override this "Limitation Statute" within the

territorial jurisdiction of the federal maritime law. In *Butler* v. *Boston & Savannah Steamship Co.*, 130 U.S. 527, 555 (1889), the Supreme Court observed:

> "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law."

In holding that a Massachusetts wrongful death action, arising from a death occurring in the admiralty jurisdiction, was subject to the "Limitation Statute", the Court went on to say:

> "It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea." 130 U.S. at 557-58.

[26] *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

[27] *Id.* at 216.

[28] *Id.* at 217-18.

[29] *See*, Currie, *"Federalism and the Admiralty," The Supreme Court Review 1960*, 158 at 166-73.

[30] 398 U.S. 375 (1970).

[31] Fla. Stat. Ann. § 768.01.

[32] 358 U.S. 588 (1959).

[33] In the *Knickerbocker* case the Court, speaking to the question of state legislative authority in the maritime field, said:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general

maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. *Moreover, it took from the States all power, by legislation or judicial decision,* to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." 253 U.S. at 160-61. (Emphasis added).

[34] Laws of Florida, 70-244 § 23.

[35] 298 U.S. 238, 313 (1936).

[36] *Watson* v. *Buck*, 313 U.S. 387 (1941).

[37] 137 So.2d 828 (Fla. 1962).

[38] *Id.* at 830.

[39] Fla. Stat. Ann. § 376.021(3)(a), (4)(a).